Shamsul bin Saad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22-NCC-735 OF 2009
MAH WENG KWAI JC
2 APRIL 2010

Civil Procedure — Striking out — Application to strike out derivative action — Whether plain and obvious case for striking out plaintiff's claim — Whether plaintiff's claim failed to disclose reasonable cause of action — Whether statement of claim inadequate and defective — Whether plaintiff had locus standi to maintain present suit — Rules of the High Court 1980 O 18 r 19

The plaintiff, a minority shareholder of 2.79% of the shares of Petra Perdana Bhd ('the fifth defendant') and an executive director of the fifth defendant, a public listed company, commenced a writ action against the first to fourth defendants, the directors of the fifth defendant company. At all material times the first defendant was a director, chief operating officer and executive chairman of the fifth defendant company in which his wife the second defendant was also a director. It was the plaintiff's case that the first to fourth defendants had breached their duty of care, as well as the fiduciary and statutory duties owed to the fifth defendant and committed acts of fraud against the fifth defendant. The plaintiff averred that a shareholders' mandate to divest 19,500,000 shares of Petra Energy Sdn Bhd (Petra), a public listed subsidiary of the fifth defendant, had been contravened thereby causing the fifth defendant to suffer losses amounting to RM500,000. The plaintiff also submitted that the first to fourth defendants were in de facto control of the board of directors and that they had committed other breaches such as breaches of Bursa's listing requirements that could expose the plaintiff as well as the fifth defendant to sanctions by the Securities Commission. The plaintiff further pleaded breaches of s 354(1)(b)(i) read with s 354(2)(h), (k), (3)(a), (b), (8) and (9) of the Capital Market Services Act 2007 as well as breaches of s 132(1) and (1F) of the Companies Act 1965. By way of this action the plaintiff sought, inter alia, a declaration that the divestment of 10,500,000 shares in Petra by the first to fourth defendants had breached the shareholders' mandate; an order prohibiting the first to fourth defendants from divesting the remaining shares of Petra Energy Bhd until final settlement of this action; and an order for damages for the losses suffered by the fifth defendant resulting from the unauthorised divestment of shares. The first and second defendants jointly filed their application under O 18 r 19 of the Rules of the High Court 1980 ('RHC') to strike out the plaintiff's writ and statement of claim on the grounds that it did not disclose a reasonable

cause of action, and that the plaintiff had no locus standi to bring the present derivative action for and on behalf of the fifth defendant company. The third and fourth defendants also jointly filed an application under O 18 r 19 of the RHC based on identical grounds, seeking a similar order. These two striking out applications were the subject matter of the instant judgment. It was the first to fourth defendants' case that since the plaintiff had commenced a derivative action for the benefit of the fifth defendant company, he had to prove that the action fell within an exception to the rule in *Foss v Harbottle*, that this action could not have been filed by the fifth defendant company because it was under the control of the first to fourth defendants and that the plaintiff had failed to cause the fifth defendant to commence this action itself. The first to fourth defendants thus contended that the plaintiff's failure to plead these facts and to prove that the first to fourth defendants had committed any fraud on the minority meant that the plaintiff had no right to bring this derivative action. The plaintiff replied that there was no statutory requirement setting out how a minority shareholder's action ought to be pleaded. The plaintiff also maintained that his statement of claim ought not to be struck out as there were several triable issues raised therein by virtue of the various breaches committed by the first to fourth defendants. The plaintiff further contended that he relied on fraud on the minority and the principle of interest of justice which were valid exceptions to the rule in *Foss v Harbottle* in initiating the present claim against the defendants. The two issues for determination in this case were whether the present case was a proper case for the court to exercise its discretionary power to strike out the plaintiff's claim under O 18 r 19 of the RHC, and whether the plaintiff had established a prima facie case of locus standi to maintain the present suit.

Held, dismissing the applications with costs:

(1) The plaintiff's statement of claim had disclosed reasonable causes of action based on fraud, breaches of fiduciary and statutory duties and negligence allegedly committed by the first to fourth defendants to the detriment of the fifth defendant. In addition the plaintiff's claim also showed that there were triable issues against the first to fourth defendants. It also raised important questions of law such as the rights of the plaintiff as a minority shareholder to bring a derivative action, the remedies of the fifth defendant in the light of alleged wrongs committed by the first to fourth defendants and the fiduciary, common law and statutory duties of the first to fourth defendants as directors of the fifth defendant. As such the plaintiff's claim ought not to be struck out (see para 12(a), (b) and (c)).

(2) The court should not look behind the statement of claim to determine whether it disclosed a reasonable cause of action. The plaintiff had clearly stated that the action was brought by him, a minority shareholder, for the benefit of the fifth defendant company. In his

statement of claim the plaintiff had clearly spelt out the statutory and common law duties owed by the first to fourth defendants to the fifth defendant and the breaches committed by the first to fourth defendants, who were in de facto control of the board of directors. As such the statement of claim was adequate and not defective and did disclose a reasonable cause of action (see para 12(d) and (i)).

(3) Once a defendant filed an unconditional appearance, it could not later raise the argument of locus standi in an application to strike out or in the hearing of the suit itself or even an appeal. Since the first to fourth defendants had filed an unconditional memorandum of appearance they could not now complain that the plaintiff did not have locus standi (see para 12(g)).

(4) The case came within the exceptions to the rule in *Foss v Harbottle*, namely, that the cause of action was based on the alleged fraud on the minority and in the interests of justice. Further, the plaintiff being a person whose interest would be affected by the breaches of the Capital Market Services Act 2007 as well as breaches of the Companies Act, should be allowed to apply for reliefs under the said Acts (see para 12(o) and (q)).

[Bahasa Malaysia summary

Plaintif, pemegang saham minoriti sebanyak 2.79% daripada saham Perdana Bhd ('defendan kelima') dan pengarah eksekutif defendan kelima, sebuah syarikat awam yang tersenarai, memulakan tindakan writ terhadap defendan-defendan kelima dan keempat, pengarah-pengarah syarikat defendan kelima tersebut. Pada kesemua masa material, defendan pertama adalah pengarah, ketua pegawai operasi dan pengerusi eksekutif syarikat defendan kelima di mana isterinya, defendan kedua yang juga pengarah. Adalah kes plaintif bahawa defendan-defendan pertama hingga keempat telah memungkiri kewajipan berjaga-jaga mereka, dan juga kewajipan-kewajipan fidusiari dan statutori terhadap defendan kelima dan melakukan tindakan fraud terhadap defendan kelima. Plaintif menegaskan bahawa mandat pemegang-pemegang saham untuk melepaskan saham Petra Energy Sdn Bhd ('Petra') sebanyak 19,500,000, subsidiari awam yang tersenarai defendan kelima, telah dilanggar dengan itu menyebabkan defendan kelima mengalami kerugian sebanyak RM500,000. Plaintif juga berhujah bahawa defendan-defendan pertama hingga keempat adalah dalam kawalan de facto lembaga pengarah dan bahawa mereka melakukan kemungkiran-kemungkiran yang lain seperti kemungkiran kehendak penyenaraian Bursa yang boleh mendedahkan plaintif dan juga defendan kelima terhadap sanksi-sanksi oleh Suruhanjaya Sekuriti. Plaintif selanjutnya memplid kemungkiran s 354(1)(b)(i) yang dibaca bersama s 354(2)(h), (k), (3)(a) dan (b), (8) dan (9) Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta') dan juga kemungkiran s 132(1) dan (1F) Akta Syarikat 1965. Melalui

tindakan ini plaintif memohon, antara lain, perisytiharan bahawa pelepasan saham sebanyak 10,500,000 di dalam Petra oleh defendan-defendan pertama hingga keempat telah memungkiri mandat pemegang-pemegang saham; perintah melarang defendan-defendan pertama hingga keempat daripada melepaskan saham Petra yang tinggal sehingga penyelesaian penuh tindakan ini; dan perintah untuk ganti rugi bagi kerugian yang dialami oleh defendan kelima akibat daripada pelepasan saham yang tidak dibenarkan ini. Defendan-defendan pertama dan kedua bersama memfailkan permohonan mereka di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan writ dan penyataan tuntutan plaintif atas alasan bahawa ia tidak mengemukakan kausa tindakan yang munasabah, dan bahawa plaintif tidak mempunyai locus standi membawa tindakan terbitan ini untuk dan bagi pihak syarikat defendan kelima. Defendan-defendan ketiga dan keempat juga bersama memfailkan permohonan di bawah A 18 k 19 KMT berdasarkan alasan-alasan yang sama, memohon perintah yang sama. Kedua-dua permohonan pembatalan ini adalah perkara pokok bagi penghakiman ini. Adalah kes-kes defendan-defendan pertama hingga keempat bahawa memandangkan plaintif telah memulakan tindakan terbitan untuk kepentingan syarikat defendan kelima, dia hendaklah membuktikan bahawa tindakan ini terangkum di dalam pengecualian kepada peraturan di dalam kes *Foss v Harbottle*, bahawa tindakan ini tidak boleh difailkan oleh syarikat defendan kelima kerana ia di bawah kawalan defendan-defendan pertama hingga keempat dan plaintif telah gagal untuk menyebabkan defendan kelima untuk memulakan tindakan ini olehnya sendiri. Defendan-defendan pertama hingga keempat oleh itu berhujah bahawa kegagalan plaintif untuk memplid fakta ini dan untuk membuktikan bahawa defendan-defendan pertama hingga keempat telah melakukan apa-apa fraud ke atas minoriti bermaksud bahawa plaintif tidak berhak untuk memulakan tindakan terbitan ini. Plaintif menjawab bahawa tidak terdapat keperluan statutori yang menetapkan bagaimana tindakan pemegang-pemegang saham minoriti patut diplidkan. Plaintif selanjutnya menyatakan bahawa penyataan tuntutannya tidak patut dibatalkan kerana terdapat beberapa isu yang boleh dibicarakan yang dibangkitkan di dalamnya melalui pelbagai kemungkiran yang dilakukan oleh defendan-defendan pertama hingga keempat. Plaintif selanjutnya berhujah bahawa dia bergantung kepada fraud ke atas minoriti dan prinsip kepentingan keadilan yang mana adalah pengecualian sah kepada peraturan di dalam kes *Foss v Harbottle* dalam memulakan tuntutan ini terhadap defendan-defendan. Dua isu untuk penentuan di dalam kes ini adalah sama ada kes ini adalah kes yang sesuai untuk mahkamah menjalankan kuasa budi bicaranya untuk membatalkan tuntutan plaintif di bawah A 18 k 19 KMT, dan sama ada plaintif telah membuktikan kes prima facie locus standi untuk mengekalkan tindakan ini.

Diputuskan, menolak permohonan-permohonan dengan kos:

(1) Penyataan tuntutan plaintif telah mengemukakan kausa-kausa tindakan

A yang munasabah berdasarkan fraud, kemungkiran kewajipan fidusiari dan statutori dan kecuaian yang dikatakan telah dilakukan oleh defendan-defendan pertama hingga keempat sehingga menjejaskan defendan kelima. Selanjutnya tuntutan plaintif juga menunjukkan bahawa terdapat isu-isu yang boleh dibicarakan terhadap B defendan-defendan pertama hingga keempat. Ia juga membangkitkan soalan undang-undang yang penting seperti hak plaintif sebagai pemegang saham minoriti untuk memulakan tindakan terbitan, remedi-remedi defendan kelima berdasarkan kesalahan-kesalahan yang C dikatakan telah dilakukan oleh defendan-defendan pertama hingga keempat dan kewajipan fidusiari, *common law* dan statutori defendan-defendan pertama hingga keempat sebagai pengarah-pengarah defendan kelima. Oleh itu tuntutan plaintif tidak patut dibatalkan (lihat perenggan 12(a), (b) dan (c)).

D (2) Mahkamah tidak patut meneliti penyataan tuntutan tersebut untuk menentukan sama ada ia mengemukakan kausa tindakan yang munasabah. Plaintif jelas menyatakan bahawa tindakan yang dimulakan olehnya, pemegang saham minoriti, untuk manfaat syarikat E defendan kelima. Dalam penyataan tuntutannya plaintif jelas menyatakan kewajipan statutori dan *common law* yang patut dilakukan oleh defendan-defendan pertama hingga keempat terhadap defendan kelima dan kemungkiran-kemungkiran yang dilakukan oleh defendan-defendan pertama hingga keempat yang mempunyai kawalan F de facto lembaga pengarah. Oleh itu, penyataan tuntutan tersebut adalah memadai dan tidak cacat dan telah mengemukakan kausa tindakan yang munasabah (lihat perenggan 12(d) dan (i)).

(3) Setelah defendan memfailkan kehadiran tanpa syarat, ia tidak boleh G kemudiannya membangkitkan alasan locus standi di dalam permohonan untuk pembatalan atau di dalam pembicaraan guaman itu sendiri atau rayuan. Memandangkan defendan-defendan pertama hingga keempat telah memfailkan memorandum kehadiran tanpa syarat mereka tidak boleh sekarang mengadu bahawa plaintif tidak H mempunyai locus standi (lihat perenggan 12(g)).

(4) Kes ini terangkum dalam pengecualian terhadap peraturan di dalam kes *Foss v Harbottle*, iaitu, bahawa kausa tindakan adalah berdasarkan fraud ke atas minoriti yang dikatakan dan dalam kepentingan keadilan. I Selanjutnya, plaintif sebagai seorang yang kepentingannya akan terjejas oleh kemungkiran-kemungkiran Akta Pasaran Modal dan Perkhidmatan 2007 dan juga kemungkiran-kemungkiran Akta Syarikat, patut dibenarkan untuk memohon relief-relief di bawah Akta-Akta tersebut (lihat perenggan 12(o) dan (q)).]

Notes

For cases on striking out generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6653–6808.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551, CA (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 CLJ 461, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Biala Pty Ltd v Mallina Holdings Ltd (No 2) (1993) 11 ACLC 1082 (refd)

Chio Tan Seng & Ors v Chong Chai Huat Ors [1997] 4 CLJ Supp 116, HC (refd)

Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing as legal representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors [2005] 4 MLJ 506; [2005] 2 CLJ 688, HC (refd)

Foss v Harbottle (1843) 2 Hare 461 (folld)

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor (and Another Appeal) [1998] 2 AMR 1653, CA (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Leong Peng Kheong & Anor v Dawntree Properties Sdn Bhd [2002] 2 MLJ 186; [2002] 1 CLJ 602, HC (refd)

Lim Chon Beng v Pulau Kembar Sdn Bhd [2005] 7 MLJ 180, HC (refd)

Nga Sheau Sheau v United Merchant Finance Bhd [2004] 4 MLJ 53, HC (refd)

Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2) [1982] 1 All ER 354, CA (refd)

Shahidan Shafie v Atlan Holdings Bhd & Anor & Other Appeals [2005] 3 CLJ 793, CA (refd)

Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487; [1991] 4 CLJ (Rep) 74, HC (refd)

Legislation referred to

Capital and Markets Services Act 2007 s 354(1)(b)(i), (2)(h), (k), (3)(a), (b), (8), (9)

Companies Act 1965 s 132(1), (1F)

Limitation Act 1953

Rules of the High Court 1980 O 1A, O 18 rr 7(1), 12(1)(a), (b), (2), 15(1), 19, 19(1)(a), O 20 r 5(1)

Wong Kian Kheong (Karen Lee and Chris Lim with him) (Chris Lim Ting & Partners) for the plaintiff.

Azhar Azizan Harun (Kelvin Seet with him) (Cheang & Ariff) for the first to fourth defendants.
Bobby Chew (Chris Koh & Chew) for the fifth defendant.

Mah Weng Kwai JC:

[1] The plaintiff by his statement of claim dated 21 December 2009 prayed for, inter alia, a declaration that the first to fourth defendants had breached their duty of care, statutory and fiduciary duties owing to the fifth defendant; a declaration that the divestment of 10,500,000 Petra Energy Bhd shares by the first and fourth defendants had breached the shareholders mandate dated 26 April 2007; a declaration that the divestment of 48,800,000 Petra Energy Bhd shares by the first to fourth defendants had breached the methods of divestment set by the board of directors on 18 November 2009; an order prohibiting the first to fourth defendants from divesting the remaining 29.59% shares of Petra Energy Bhd until the plaintiff requisitions an extraordinary general meeting ('EGM') of the fifth defendant or final settlement of this action whichever is the earlier, and an order for damages to be assessed for the losses suffered by the fifth defendant resulting from the unauthorised divestment of shares.

[2] On 14 January 2010 the first and second defendants jointly filed their summons in chambers (encl 16) for an order under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') that the plaintiff's writ of summons and statement of claim be struck out with costs on the grounds that the statement of claim does not disclose a reasonable cause of action and that the plaintiff has no locus standi to bring this action as a derivative action for and on behalf of the fifth defendant. The first and second defendants claimed that the plaintiff has failed to plead that the fifth defendant which has been allegedly wronged, is unable to sue because the first to fourth defendants are in control of the board of directors of the fifth defendant and would not allow the fifth defendant to bring the action in its name.

[3] The first and second defendants also claimed that the plaintiff has failed to plead that a request had been made to the board of directors of the fifth defendant for an action to be brought against the first to fourth defendants in its name prior to the filing of the action.

[4] On 15 January 2010, the third and fourth defendants also jointly filed a summons in chambers (encl 20) seeking a similar order under O 18 r 19(1)(a) of the RHC against the plaintiff based on identical grounds.

THE FIRST TO FOURTH DEFENDANTS' CASE

[5] Counsel for the first to fourth defendants submitted that as this action is supposedly a derivative action the plaintiff will have to come within an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461 to be able to maintain it. The rule in *Foss v Harbottle* is that when a company is wronged, the cause of action lies with the company and not with a shareholder. The plaintiff can only bring a derivative action if it falls within an exception to the rule in *Foss v Harbottle*.

[6] In particular, counsel for the first to fourth defendants submitted that the plaintiff has failed to plead the following:

(a) facts which would show that this action falls within an exception to the rule in *Foss v Harbottle*;

(b) that this action is brought for the benefit of the fifth defendant, and the shareholders of the fifth defendant (including the plaintiff) other than the first to fourth defendants;

(c) that the first to fourth defendants are in control of the fifth defendant by commanding the majority of the votes at a general meeting of the fifth defendant;

(d) that this action could not have been filed by the fifth defendant itself as it is under the control of the first to fourth defendants; and

(e) that the plaintiff has failed to cause the fifth defendant to commence this action itself.

[7] Counsel for the first to fourth defendants also submitted that besides the alleged breaches of the duty of care, statutory and fiduciary duties of the first to fourth defendants, there is no allegation that the first to fourth defendants had committed any fraud on the minority at all. The plaintiff has not shown that the first to fourth defendants are in control of the fifth defendant and that they would have blocked any attempt by the fifth defendant to commence an action against the first to fourth defendants for their alleged wrongdoings. Counsel also submitted that without showing that the first to fourth defendants are in control of the fifth defendant, the plaintiff has no right to bring this derivative action.

THE PLAINTIFF'S CASE

[8] Counsel for the plaintiff submitted that there is no statutory requirement setting out how a minority shareholder's action ought to be pleaded. The statement of claim has disclosed reasonable causes of action

against the first to fourth defendants based on allegations of fraud, breaches of fiduciary and statutory duties and negligence. The statement of claim has been adequately pleaded under O 18 r 7(1), r 12(1)(a), (b), (2) and r 15(1) of the RHC. The statement of claim is not defective as the plaintiff in the title of the writ of summons has cited the plaintiff as 'acting as a minority shareholder of Petra Perdana Bhd and bringing this action for the benefit of Petra Perdana Berhad', the fifth defendant.

[9] The plaintiff relies on fraud on the minority which is an exception to the rule in *Foss v Harbottle* and on interest of justice which is another exception to the rule in *Foss v Harbottle* and statutory exceptions.

[10] Counsel for the plaintiff contended further that the first to fourth defendants have breached various provisions of the Capital and Markets Services Act 2007 and the Companies Act 1965 and that a case can only be struck out under O 18 r 19 of the RHC if it discloses no reasonable cause of action and only in plain and obvious cases. The plaintiff's statement of claim ought not to be struck out as there are triable issues by virtue of the various breaches by the first to fourth defendants. There are important questions of law to be tried and in the event the statement of claim is held to be defective, the plaintiff undertakes to amend the same.

[11] Counsel for the plaintiff reiterated that the court should bear in mind the provisions of O 1A of the RHC on the justice of the case and not on technical non-compliance of any rule in the RHC.

REASONS FOR DECISION

[12] After reading encls 16 and 20, the affidavit No 1 of the plaintiff, the written submissions of counsel for the first to fourth defendants and counsel for the plaintiff, I held that this was not a proper case for the court to exercise its discretionary power to strike out the plaintiff's claim under O 18 r 19(1)(a) of the RHC on the following grounds:

(a) The plaintiff's statement of claim has disclosed reasonable causes of action based on fraud, breaches of fiduciary and statutory duties and negligence allegedly committed by the first to fourth defendants to the detriment of the fifth defendant.

(b) The plaintiff's claim ought not to be struck out as the plaintiff has shown there are triable issues against the first to fourth defendants based on allegations of fraud, breaches of fiduciary and statutory duties and negligence.

(c) The statement of claim raises important questions of law to be tried namely the:

(i) rights of the plaintiff as a minority shareholder to bring a derivative action;

(ii) remedies of the fifth defendant in light of alleged wrongs committed by the first to fourth defendants causing the fifth defendant to suffer losses;

(iii) fiduciary and common law duties of the first to fourth defendants as directors of the fifth defendant; and

(iv) statutory duties of the first to fourth defendants.

(d) The statement of claim is adequate and not defective as the plaintiff has pleaded the following matters:

(i) the title of the writ of summons clearly states that this action is brought by the plaintiff as a minority shareholder of the fifth defendant and is brought for the benefit of the fifth defendant;

(ii) para 1 of the statement of claim states that the plaintiff is a minority shareholder of 2.79% shares of the fifth defendant and an executive director of the fifth defendant;

(iii) para 2 of the statement of claim states that the first defendant holds 12.94% shares of the fifth defendant and is a director, chief operating officer and executive chairman of the fifth defendant;

(iv) the statement of claim also discloses that the second defendant is the first defendant's wife and director of the fifth defendant while the third and fourth defendants are independent non-executive directors of the fifth defendant. It also states that the fifth defendant is a public-listed company;

(v) para 7 of the statement of claim states that Petra Energy Bhd is a public listed subsidiary of the fifth defendant, where fifth defendant owns 64.6% shares of Petra Energy Bhd;

(vi) para 8 of statement of claim states the shareholders' mandate obtained by the fifth defendant is to divest 19,500,000 shares of Petra Energy Bhd ('shareholders' mandate');

(vii) para 13 of the statement of claim states that the divestment of the second block of Petra Energy Bhd's shares which had contravened the shareholder's mandate has caused the fifth defendant to suffer losses amounting to RM500,000;

(viii) para 17 of the statement of claim states that the board of directors has given a mandate to divest the remaining block of the fifth

defendant's shares totaling 54.62% ('remaining block') in accordance with the seven conditions, which are as follows ('conditions'):

(1) that the remaining block must be divested en bloc;

(2) the remaining block must be divested through an open tender;

(3) a valuation of the remaining block must be done prior to the divestment;

(4) divestment of the remaining block must not be less than the minimum nett price of RM1.80 for each share;

(5) an announcement by the fifth defendant to Bursa Malaysia regarding the board of director's decision to divest the remaining Block must be made immediately after the board of directors obtained the valuation of the remaining block;

(6) the board of directors has the final decision whether or not to divest the remaining block; and

(7) divestment of the remaining block must comply with all the aforesaid conditions;

(ix) paras 18 and 19 of the statement of claim state that after the board of directors' meeting was held to decide on the conditions, the first defendant has appointed the sixth defendant to conduct a valuation of Petra Energy Bhd's shares and the first defendant appointed the sixth defendant as placement agent for the remaining block ('appointment');

(x) the plaintiff was however, not aware of the appointment and had only found out after the appointment;

(xi) paras 21 and 22 of the statement of claim spell out the common law and statutory duties owed by the first to fourth defendants toward the fifth defendant;

(xii) the breaches committed by the first to fourth defendants were described in detail, in paras 24 to 30 of the statement of claim;

(xiii) paras 31 and 32 of the statement of claim clearly show that the first to fourth defendants were in de facto control of the board of directors;

(xiv) para 37 of the statement of claim sets out the first to fourth defendants' breach of the shareholders' mandate;

(xv) more serious are the facts set out in paras 38 and 39 of the statement of claim where the first to fourth defendants have caused the divestment of the remaining block in breach of the conditions. The

allegations contained in these paragraphs include the breach by the first to fourth defendants of Bursa's listing requirement which could expose the plaintiff as well as the fifth defendant to sanctions by the Securities Commission;

(xvi) para 48 of statement of claim sets out the losses suffered by the fifth defendant;

(xvii) paras 52 and 53 of the statement of claim set out the demand made by the plaintiff to the first to fourth defendants to prevent them from further divesting the remaining block; and

(xviii) the prayers that the plaintiff are seeking from the court are clearly set out in para 56(a) to (h) of the statement of claim.

(e) An important issue to be determined by the court in this case is whether the plaintiff has established a prima facie case of locus standi to maintain the present suit. The first to fourth defendants have contended albeit impliedly, that the plaintiff has not.

(f) In the case of *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487; [1991] 4 CLJ (Rep) 74, Edgar Joseph Jr J (as he then was) held that the issue of locus standi should be disposed of as a preliminary issue. In so doing the learned judge adopted the procedure laid down in *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)* [1982] 1 All ER 354 where the English Court of Appeal held that prior to the determination of the substantive issues, it must first be determined that the company was in the control of the wrongdoers so as to found the minority shareholder's entitlement to bring the derivative action.

(g) In determining the preliminary issue of locus standi it will be noted that the first to fourth defendants filed an unconditional memorandum of appearance. That being so, the first to fourth defendants cannot now complain that the plaintiff does not have locus standi The Supreme Court has held that once a defendant files an unconditional appearance, it cannot later raise the argument of locus standi whether in an application to strike out or in the hearing of the suit itself or even an appeal. In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 CLJ 461 the Supreme Court per Hj Mohd Jemuri Serjan CJ (Borneo) held:

> [p 475] The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980 because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse.

A [p 478] It was open to the defendants to resort to O 18 r 19 or O 33 r 2 of our RHC but they chose not to do so but to bring up the locus standi issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the defendants to invoke O 18 r 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke O 18 r 19 ...

B

This principle in *Alor Janggus* has been consistently applied by the High Court in the following cases:

C (i) *Leong Peng Kheong & Anor v Dawntree Properties Sdn Bhd* [2002] 2 MLJ 186; [2002] 1 CLJ 602 per Azmel Maamor (as he then was);

(ii) *Nga Sheau Sheau v United Merchant Finance Bhd* [2004] 4 MLJ 53 at p 58 per Low Hop Bing J (now JCA);

D (iii) *Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing as legal representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506; [2005] 2 CLJ 688 at p 697 per Low Hop Bing J (now JCA); and

E (iv) *Lim Chon Beng v Pulau Kembar Sdn Bhd* [2005] 7 MLJ 180 at p 188 per Low Hop Bing J (now JCA).

(h) From the plaintiff's averments in the statement of claim it could not be said that this was a plain and obvious case for striking out the statement of claim as disclosing no reasonable cause of action pursuant to O 18 r 19(1)(a). In the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 the Supreme Court per Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) held that:

F

G [1] The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face

H of it obviously unsustainable.

[2] So long as the pleadings disclose some [cause] of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

I

(i) The court should not look behind the statement of claim to determine whether it discloses a reasonable cause of action. The only reasonable course is for the court to proceed on the basis that everything alleged in the statement of claim are true. In the cited Court of Appeal case of

Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor (and Another Appeal) [1998] 2 AMR 1653 it was held by Gopal Sri Ram JCA (as he then was) that:

> The principles governing an application made under O 18 r 19(1)(a) are well settled and have been stated by our courts on many occasions. For my part I can do no better than to quote from the judgment of Raja Azlan Shah J (as he then was) in *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 at p 88:
>
> > It is firmly established that the power exercised under r 4 (the precursor to O 18 r 19) is only perceived in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is sufficient, even if proved, to entitle me plaintiff to the relief of which he ask for: see the judgment of Lindley MR in *Hubbuck & Sons v Wilkinsons, Heywood & Clark Ltd* [1899] 1 QB 86, 91. Where the situation arises, the pleadings and particulars alone shall be considered and *all the allegations in it shall be presumed to be true*, and it is only on that assumption that any suitable case can be made for this application: see *Peck v Russell* (1923) 4 FMS LR 32, 34. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v Holder* (1886) 54 LT 298.

(j) It is trite law that the mere fact that the claim is not likely to succeed at trial is not a ground for the case to be struck out. Please refer to *Bandar Builder*'s case.

(k) The court should look at the justice of the case and not at technical non-compliance of any rule in the RHC. Reference is made to O 1A of the RHC which provides:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

(l) In the cited case of *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551, the Court of Appeal per Gopal Sri Ram JCA (as he then was) held:

> a derivative action is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs, and will not, for that reason permit an action to be brought in its name. In these circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. But in so doing he must cite the company and the wrongdoers as defendants and the title to the

A action must reflect that the suit is being brought in a representative capacity. The statement claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so, and further, there must be an express statement in the pleading that the action is being brought for the benefit of the company. A plaintiff
B in a derivative action cannot thus sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company.

(m) In this case, the plaintiff has pleaded in the title of the writ of summons
C and in para 1 of the statement of claim that he is a shareholder of the fifth defendant and was bringing this action as a derivative action in his capacity as a minority shareholder of 2.79% shares, and for the benefit of fifth defendant. The plaintiff has cited the wrongdoers as the defendants. I am thus of the view that the plaintiff has satisfied the
D requirements as set out in the case of *Abdul Rahim bin Ali*.

(n) In the decision of the Supreme Court of Western Australia in *Biala Pty Ltd v Mallina Holdings Ltd (No 2)* (1993) 11 ACLC 1082 at p 1102, Ipp J considered it desirable to allow a minority shareholder to bring a
E derivative claim where the justice of the case clearly demanded that such a claim be brought irrespective of whether the claim fell with the confines of the established exceptions.

(o) Further, I am of the view that this case comes within the exceptions to
F the rule in *Foss v Harbottle* namely, that the cause of action is based on the alleged fraud on the minority and in the interests of justice. In the words of Edgar Joseph Jr J (as he then was) in *Tan Guan Eng*'s case the concept of 'control' of a company embraces a broad spectrum of positions within a company and that control could arise as the result of
G indifference or apathy. There would be an exception to the rule in *Foss v Harbottle* if it could be shown that the wrongdoers were able 'by means of manipulation of their position in the company' to ensure that the action is not brought by the company. The traditional view of 'control' is one of ownership but there is new view of control — as to
H who has de facto control of the company.

(p) In any event, I am of the view that there is no requirement in a pleading based on the alleged fraud on the minority to plead that the defendants are in control of the board of directors of the aggrieved company. There
I is also no requirement for a demand to be made for the aggrieved company to seek legal remedies against the controlling directors before a minority shareholder can commence legal proceedings. In the cited case of *Chio Tan Seng & Ors v Chong Chai Huat Ors* [1997] 4 CLJ Supp 116 Abdul Malik Ishak (now JCA) held:

> It is my considered opinion that under the first view even if fraud is not pleaded, which was not the case here, the derivative action would be allowed to proceed for the simple reason that if it is otherwise, the minority will be left with 'no other remedy'. This is in effect a sensible approach.

(q) The plaintiff has pleaded breaches of s 354(1)(b)(i) read with s 354(2)(h), (k), (3)(a), (b), (8) and (9) of the Capital and Market Services Act 2007 as well as breaches of s 132(1) and (1F) of the Companies Act. Besides the Securities Commission and the Companies Commission of Malaysia having recourse against the first to fourth defendants, the plaintiff being a person whose interest would be affected by the breaches of the said Acts, should be allowed to apply for reliefs under the said Acts.

(r) The issue of whether the plaintiff may rely on any one or all of the exceptions to the rule in *Foss v Harbottle* is essentially a question of law and fact to be tried. The court will not entertain an application to strike out a claim where the pleading raises an important point of law. In the cited case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, the Federal Court per Gopal Sri Ram JCA (as he then was) held:

> There is no dearth of authority dealing with the approach that a court should take when exercising its summary jurisdiction under O 18 r 19. The unanimous view is that the summary power ought not to be invoked save in a plain and obvious case. An examination of the record provided demonstrated that this was not such a case. There were several issues of law that required mature consideration. And there were several issues of fact that were capable of resolution only after taking viva voce evidence. There was therefore no justification for striking out the writ in this case *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 followed.

(s) As I am of the view that the statement of claim is not defective, there was no need for the court to exercise its power to direct an amendment to be made to the statement of claim as vested in the court by O 18 r 19 of the RHC. This power is separate and distinct from the power conferred by O 20 r 5(1) to permit an amendment on the application of the plaintiff himself. Please refer to the Court of Appeal case of *Shahidan Shafie v Atlan Holdings Bhd & Anor & Other Appeals* [2005] 3 CLJ 793 per Gopal Sri Ram JCA (as he then was).

(t) I was also mindful of the fact that as there is no issue of time bar under the Limitation Act 1953 in this case, the plaintiff could always file a fresh suit in the event the claim was struck out by the court due to defective pleading in the statement of claim.

(u) Importantly, in this case the alleged defective pleadings or the lack of pleadings do not occasion any disadvantage or cause any prejudice to the first to fourth defendants as the statement of claim as it stands is sufficient for the first to fourth defendants to know the causes of action relied upon and for them to meet the case appropriately in their defence. There is no undue surprise sprung by the plaintiff on the first to fourth defendants.

[13] Accordingly, the applications (encls 16 and 20) were dismissed with costs.

Applications dismissed with costs.

Reported by Kohila Nesan